IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 8, 2008

IN RE M.F.O. AND J.O.O., II

Appeal from the Juvenile Court for Maury County
No. 73093; 73094; 73095; 73096; 73097 George L. Lovell, Judge

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No. M2008-01322-COA-R3-PT - Filed May 21, 2009

Parents appeal order of Juvenile Court terminating parental rights to their five children. Trial Court found that parents had abandoned the children by failure to provide support; that parents had failed to substantially comply with the requirements of the permanency plan; that the conditions which led to the children being placed in the custody of the Department of Children's Services persisted; and that termination was in the best interest of the children. We affirm the judgment, as modified.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Modified and Affirmed

RICHARD H. DINKINS, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P.J., M.S. and FRANK G. CLEMENT, JR., J. joined.

L. Samuel Patterson, Jr., Columbia, Tennessee, for the appellant, J.O.O, II.

William C. Barnes, Jr., Columbia, Tennessee, for the appellant, M.F.O..

Elizabeth C. Driver, Senior Counsel, Office of the Attorney General, Nashville, Tennessee, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

This appeal involves the termination of parental rights with regard to five children, ages six to one at the time of the hearing. The two oldest children first came into protective custody of the Department of Children's Services ("DCS") on July 21, 2003, as a result of a finding that they were dependent and neglected; they were removed from the home and placed in foster care.[1] On February 9, 2004, pursuant to DCS' motion, the Juvenile Court allowed the children to return to the parents' custody for a trial ninety-day home visit. After a hearing on March 5, 2004, on DCS' motion for emergency removal, the court suspended the home visit; a further hearing was set. On June 15,

[1] The children were 10 and 20 months old at the time of the first proceeding.

2004, an order was entered allowing the children to be returned to the custody of their parents subject to Mother and Father's agreement to keep the children in child care on a daily basis and allow DCS to provide services in their home for a period of six months.

On March 9, 2005, DCS filed a second petition seeking to have the children declared dependent and neglected; this petition also included the parents' third child, who had been born in June 2004. An order was entered placing the children in the temporary custody of DCS and setting the matter for further hearing. Following a hearing on May 9, 2005, the petition to have the children placed in the custody of DCS was denied and the children were returned to the custody of their parents.

On December 15, 2005, DCS filed a third petition seeking to have the children declared dependent and neglected; this petition also included the fourth child, who was born in July 2005. By order entered January 19, 2006, the court found clear and convincing evidence that the children were dependent and neglected,[2] but allowed the children to remain in the home subject to certain conditions; the order required the parents to cooperate with Family Support Services, enroll the children in Head Start and day care programs, and provide the children with beds.

On March 7, 2006, DCS filed a motion to review the parents' compliance with the prior order and safety plan; the Guardian *ad litem* filed a petition to have the children declared dependent and neglected on the same day. Based on the sworn allegations in the Guardian *ad litem*'s petition, temporary custody of the children was given to DCS and a further hearing set. A consent order was entered on March 31, 2006, finding, *inter alia,* that Mother and Father had not complied with the court ordered safety plan; that the children were living in a motel; and that "all reasonable efforts have been made and services have been rendered to prevent or eliminate the removal of said children from the home," but that there was no less drastic alternative.

On March 21, 2006, DCS, along with Mother and Father, developed permanency plans for the four children who were in DCS custody at the time. The plans contained joint as well as individual obligations for Mother and Father, with the permanency goal of "reunification with parents/adoption" with a target date of September 21, 2006. The plans were approved by the court on July 10, 2006.

On July 5, 2006, the Guardian *ad litem* filed a petition to have the fifth child of Mother and Father, born on July 2, declared dependent and neglected based on both the baby and Mother testing positive for cocaine while in the hospital.[3] The court granted this petition. A permanency plan was developed for the youngest child on July 19, 2006; the plan had similar obligations and the same reunification goal as those for the other children.

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[2] This finding was by agreement of the parties.

[3] Prior to the Guardian *ad litem*'s filing, Father filed a Petition requesting that the baby's maternal grandmother be appointed as guardian.

DCS initiated the proceeding to terminate the parental rights of Mother and Father on April 20, 2007, alleging as grounds: (1) abandonment by failure to visit; (2) abandonment by failure to support; (3) abandonment by failure to provide a suitable home; (4) substantial noncompliance with permanency plan; and (5) persistence of conditions. Mother filed an answer to the petition, denying that her parental rights should be terminated, asserting that the circumstances which led to the children's removal from the home had changed, and requesting that the children be returned to her custody. The record in this court does not show an answer to the termination petition being filed on behalf of Father, although the record does show that he participated in person and by counsel throughout the trial court proceedings and in this appeal.

Following a hearing, the Juvenile Court entered its decree on June 6, 2008, finding clear and convincing evidence that Mother and Father had abandoned the children by failing to support them while they were in the custody of DCS; by failing to provide a suitable home for the children; by failing to comply with permanency plans; and because the conditions which led to the removal of the children persisted. The court further determined that termination of the parental rights of Mother and Father was in the best interest of the children. Mother and Father appeal, both asserting that the grounds for termination are unsupported by clear and convincing evidence.

I. STANDARD OF REVIEW

A parent has a fundamental right to the care, custody, and control of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Nash-Putnam v. McCloud*, 921 S.W.2d 170, 174 (Tenn. 1996). Thus, the state may interfere with parental rights only if there is a compelling state interest. *Nash-Putnam*, 921 S.W.2d at 174-75 (citing *Santosky v. Kramer,* 455 U.S. 745 (1982)). Our termination statutes identify "those situations in which the state's interest in the welfare of a child justifies interference with a parent's constitutional rights by setting forth grounds on which termination proceedings can be brought." *In re W.B.*, 2005 WL 1021618, at *7 (citing Tenn. Code Ann. § 36-1-113(g)). A person seeking to terminate parental rights must prove both the existence of one of the statutory grounds for termination and that termination is in the child's best interest. *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *In re Valentine,* 79 S.W.3d 539, 546 (Tenn. 2002); Tenn. Code Ann. § 36-1-113(c).

Because of the fundamental nature of the parent's rights and the grave consequences of the termination of those rights, courts must require a higher standard of proof in deciding termination cases. *Santosky*, 455 U.S. at 769; *Matter of M.W.A., Jr.*, 980 S.W.29 620, 622 (Tenn. Ct. App. 1998). Thus, both the grounds for termination and the best interest inquiry must be established by clear and convincing evidence. Tenn. Code Ann. § 36-3-113(c)(1); *In re Valentine*, 79 S.W.3d at 546. Clear and convincing evidence "establishes that the truth of the facts asserted is highly probable . . . and eliminates any serious or substantial doubt about correctness of the conclusions drawn from the evidence." *In re M.J.B.*, 140 S.W.3d 643, 653 (Tenn. Ct. App. 2004). Such evidence "produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established." *Id.* at 653.

In light of the heightened standard of proof in these cases, a reviewing court must adapt the customary standard of review set forth by Tenn. R. App. P. 13(d). *In re M.J.B.*, 140 S.W.3d at 654. As to the court's findings of fact, our review is *de novo* with a presumption of correctness unless the evidence preponderates otherwise, in accordance with Tenn. R. App. P. 13(d). *Id.* We must then determine whether the facts, as found by the trial court or as supported by the preponderance of the evidence, clearly and convincingly establish the elements necessary to terminate parental rights. *Id.*

II. DISCUSSION

A. Abandonment by failure to support

Tenn. Code Ann. § 36-1-113(g)(1) designates "abandonment," as defined in Tenn. Code Ann. § 36-1-102, as a ground for terminating parental rights. Tenn. Code Ann. § 36-1-102(1)(A)(i) defines "abandonment" in part pertinent to this issue as follows:

> For a period of four (4) consecutive months immediately preceding the filing of a proceeding or pleading to terminate the parental rights of the parent(s) or guardian(s) of the child who is the subject of the petition for termination of parental rights or adoption, that the parent(s) or guardian(s) . . . have willfully failed to support or have willfully failed to make reasonable payments toward the support of the child.

Id.

In order to find "abandonment," there must be a "willful" failure to render support by the parent whose rights are being terminated. *See In Re Swanson,* 2 S.W.3d 180, 184-85 (Tenn. 1999). As found by the court in *In re S.M.*, 149 S.W.3d 632 (Tenn. Ct. App. 2004), "willfulness" in parental rights cases does not require the same standard of culpability required by the penal code nor does it require malevolence or ill will. *Id.* at 642. Failure to pay support under the termination statutes is "willful" if the parent "is aware of his or her duty to support, has the capacity to provide the support, makes no attempt to provide support, and has no justifiable excuse for not providing the support." *State of Tenn., Dep't. of Children's Serv. v. Calabretta*, 148 S.W.3d 919, 926 (Tenn. Ct. App. 2004) (citing *In re Adoption of Muir,* 2003 WL 22794524 (Tenn. Ct. App. Nov. 25, 2003)). The fact that a parent may not be under an order to pay support is not dispositive of the question of whether the failure is willful, as the obligation to pay support exists in the absence of a specific order. *Id.*

With respect to this issue, the trial court found as follows:

> Respondents have willfully not supported the children or have made only token payments toward the children's support. Respondents knew or should have known that they had to pay child support. Respondents are able-bodied and capable of working and earning enough to support them as well as paying child support. The Respondent [Father] testified that he has been employed at several positions while the children were in the Department's custody. Respondents were not in jail or

> incapacitated in the four months before the termination of parental rights petition was filed and they could have worked and supported the children. Respondents knew the consequences of their failure to support the children because they signed documentation verifying that they received a copy of the Criteria & Procedures for Termination of Parental Rights and have been given an explanation of its consequences on March 21, 2006 and July 19, 2006.

Neither the orders granting the dependent and neglect petitions nor the permanency plans approved by the court included a requirement that Mother or Father pay support. The only proof that either party was told of an obligation to pay support was the testimony of Ms. Shenilla Peacock, the DCS caseworker assigned to the case, who testified that: "we discussed at the permanency plan meetings about child support." With respect to Mother, the proof was that the only funds she was receiving was Supplemental Security Income which, according to the testimony of Mr. Larry Roe, employed by the District Attorney's Office to assist in the collection of child support, could not be used to establish income for purposes of setting support. Father testified that he had been working for a fence company "off and on" for six of the past seven years; that he had worked for other employers as well; and that he had not been told a specific amount of support to pay for the children that were subject to the termination proceeding. There was also proof that Father was paying support for children other than those which were the subject of the termination proceeding.

From the foregoing, the evidence of record is not clear and convincing that either Mother or Father's failure to pay support was willful. The only evidence that DCS discussed child support with Mother and Father was the testimony of Ms. Peacock, whose testimony was lacking in specifics as to what was discussed, the amount that either was to pay or that Mother and Father were advised of the consequences of not paying support. Significant also is the fact that DCS did not seek an order of support in the dependent and neglect proceedings or include the payment of support as part of the permanency plans. We do not excuse Mother and Father's failure to pay support; we hold only that DCS has not shown by clear and convincing evidence that their failure was wilful.

Consequently, we reverse the trial court's finding that Mother and Father abandoned the children by failing to support them.

B. Abandonment by failure to provide a suitable home

Tenn. Code Ann. § 36-1-102(1)(A)(ii) defines "abandonment" as respects this issue as follows:

> (ii) The child has been removed from the home of the parent(s) or guardian(s) as a result of a petition being filed in the juvenile court in which the child was found to be a dependent and neglected child, as defined in § 37-1-102, and the child was placed in the custody of the department . . . that the juvenile court found . . . that the department . . . made reasonable efforts to prevent removal of the child . . . and for

> a period of four months following the removal, the department or agency has made reasonable efforts to assist the parent(s) or guardian(s) to establish a suitable home for the child, but that the parent(s) or guardian(s) have made no reasonable efforts to provide a suitable home and have demonstrated a lack of concern for the child to such a degree that it appears unlikely that they will be able to provide a suitable home for the child at an early date...

Tenn. Code Ann. § 36-1-102(1)(A)(ii).

The trial court found that DCS made reasonable efforts and provided services to prevent removal of the children in the period the children had been in the custody of DCS, but that Mother and Father had failed to cooperate with DCS or comply with services made available to them and that they had not made reasonable efforts to provide a suitable home. In making this determination, the court relied upon testimony that DCS had arranged parenting classes, psychological exams, drug and alcohol assessments and anger management classes throughout the time the children had been in DCS custody. In the consent order entered on April 10, 2006, Mother and Father agreed that "the parties have not complied with the court ordered safety plan and are now living in a motel" and that ". . . all reasonable efforts have been made to prevent or eliminate the removal of the children from the home."

Ms. Peacock testified that in March of 2006 Mother and Father did not have a place to live and had asked family members to take care of the children.[4] In the period since the children were placed in DCS custody, the Department funded a parenting assessment for Mother; drug and alcohol assessment and counseling for Mother and Father; and anger management and in-home counseling services for Mother and Father, including assisting the parents with age-appropriate discipline, infant care and developing appropriate nutritional plans for the children. There was additional proof that DCS' assistance to Mother and Father began in May of 2004 and some measure of assistance was given each time a dependency and neglect petition was filed. There was also proof that Ms. Peacock had difficulty communicating with Mother and Father; that Mother told Ms. Peacock that Mother did not need a parenting assessment after having completed one previously; and, of course, the series of dependent and neglect proceedings.

We do not agree with Mother that matters related to counseling and assessments have no bearing on the suitability of the home, as that concept is contemplated in Tenn. Code Ann. § 36-1-102(1)(A)(ii). While there is, of course, a physical element to the concept of a "suitable home," the problems and conditions for which the various assessment and counseling efforts were conducted address matters which make the home environment suitable for raising children and which keep them from becoming dependent and neglected. A well-built, fully furnished home does not a "suitable home" make; neither is a home which may lack some comforts or conveniences unsuitable for that reason alone. The failure of Mother and Father to cooperate with DCS and to comply with

[4] The Dependent and Neglect Petition filed on March 7, 2006, by the Guardian *ad litem* alleged that three of the children had been left at their grandmother's home on March 2 and that Mother had not returned.

the requirements of the various counseling services was directly related to the establishment and maintenance of a suitable home.

Neither do we agree with Mother and Father that the fact that they were living in a home at the time of the hearing is dispositive of this issue. The proof established that, during the time of DCS involvement, the family lived in a trailer, a motel and a house. The January 2006 Order entered in reference to the third dependent and neglect petition required the parents to provide beds for their children. This, however, was followed by the consent order entered on March 31, 2006, which found that Mother and Father had not complied with the court ordered safety plan and that the children were living in a motel. The record as a whole shows that Mother and Father had periodic improvement in their living situation, generally attendant to the filing of a dependent and neglect petition, but failed to establish a stable and suitable home for their five children. We find this ground for termination is supported by clear and convincing evidence.

C. Substantial noncompliance with permanency plan

Tenn. Code Ann. § 36-1-113(g)(2) provides that substantial noncompliance with a permanency plan is a ground for termination of parental rights. In order for noncompliance to justify the termination of parental rights, it must be "substantial." *In re S.H.*, No. M2007-01718-COA-R3-PT, 2008 WL 1901118, at *7 (Tenn. Ct. App. Apr. 30, 2008) (no Tenn. R. App. P. 11 application filed). Mere technical noncompliance by itself is not sufficient to justify the termination of parental rights. *See id.* In conjunction with terminating a parent's rights on the ground of substantial noncompliance, the trial court must find that the requirements of the permanency plan that the parent allegedly did not satisfy are "reasonable and related to remedying the conditions which necessitate foster care placement." *In re Valentine,* 79 S.W.3d at 547 (quoting Tenn. Code Ann. § 37-2-403(a)(2)(c). Noncompliance with requirements in a permanency plan that are neither reasonable nor related to remedying the conditions that led to the removal of the child from the parents' custody is not relevant for purposes of Tenn. Code Ann. § 36-1-113(g)(2). *In re S.H.*, 2008 WL 1901118, at *7. Additionally, the parents' degree of noncompliance with a reasonable and related requirement must be assessed. *See id.* The issue of substantial noncompliance with the requirements of a permanency plan is a question of law; therefore, it is reviewed *de novo* with no presumption of correctness. *In re Valentine,* 79 S.W.3d at 546.

The permanency plans for the four oldest children were dated March 21, 2006, and were approved by the court on July 10, 2006. The permanency plan for the youngest child was developed on July 19, 2006 and agreed to by Mother and Father. The plans contained joint as well as individual obligations for Mother and Father, including requirements to participate in assessment and counseling programs to address long-standing challenges each faced in order to meet the stated goals of reunification. In order to address her history of mental health challenges and drug use, Mother was required to continue mental health treatment that she was undergoing, as well as to undergo drug testing and participate in an in-home counseling regime. Father was required to undergo drug and alcohol testing and counseling and anger management counseling, as well as the in-home counseling.

Neither Mother nor Father contend that the requirements of the permanency plans were not reasonable.

Ms. Bridget Moore of Tennessee Kids First, an agency that provided the anger management, alcohol and drug and parenting counseling, testified that she provided eight hours of services per month for each of the areas. With respect to drug issues, Ms. Moore stated that Mother underwent a random drug test twice per month and that, over the last four months, Mother had passed only the last three tests[5] and that Father had passed all his drug tests. Ms. Moore further testified that both Mother and Father's attitudes were better as they participated in anger management counseling and that she had not been able to assess the effectiveness of the parenting counseling, since the children were not at home when the sessions were held. She felt that Father needed to continue his participation in anger management counseling but that he did not have any alcohol or drug problems that needed to be addressed.

Dr. Doug Mayes, engaged to do the parenting assessments, psychological evaluations and drug and alcohol assessments of Mother and Father, testified that he had been able to perform all the assessments with respect to Father except one and that Mother had missed several appointments, as a result of which the evaluations had not been completed as of the time of the hearing. Ms. Leanne Medford of Omni Visions, engaged to conduct the parenting classes, testified that, although Mother and Father had participated in classes in 2003, they failed to keep their appointments for the 2006 classes. Ms. Shenilla Peacock, the DCS caseworker, testified at length regarding the efforts the Department made to assist Mother and Father in performing their responsibilities under the permanency plans, including getting financing for the various assessments and evaluations and arranging transportation for Mother and Father to attend and participate in them. Her testimony detailed continued resistance of Mother, in particular, to complying with the permanency plans and, with respect to Father, substantial compliance.

On the basis of the record before us, we have determined that the trial court's finding that Mother failed to comply with the permanency plans is supported by clear and convincing evidence. With respect to Father, however, the evidence is not clear and convincing and, consequently, the finding of the trial court with respect to Father must be reversed.

D. Persistence of conditions

The trial court also found as a ground for termination pursuant to Tenn. Code Ann. § 36-1-113(g)(3) that the conditions which led to the removal of the children persisted. In making this determination, the court reviewed the extensive history of the parents' involvement with the Department, the reasons for and circumstances of each removal of the children from the home, and

[5] There was some thought that Mother failed the first five tests because of medicine that she was taking at the time, however, the testimony was that Mother was also taking the medicine when she passed the last three tests.

the efforts made by each parent to remedy the conditions. The evidence of record fully supports the finding that the conditions which led to the removal of the children persisted.

E. Best Interest of the Children

Once a ground for termination has been proven by clear and convincing evidence, the trial court must then determine whether it is the best interest of the child for the parent's rights to be terminated, again using the clear and convincing evidence standard. The legislature has set out a list of factors for the courts to follow in determining the child's best interest at Tenn. Code Ann. § 36-1-113(I). The list of factors set forth in the statute is not exhaustive, and the statute does not require every factor to appear before a court can find that termination is in a child's best interest. *See In re S.L.A.*, 223 S.W.3d 295, 301 (Tenn. Ct. App. 2006) (citing *State of Tennessee Dep't of Children's Servs. v. T.S.W.*, No. M2001-01735-COA-R3-CV, 2002 WL 970434 at *3 (Tenn. Ct. App. May 10, 2002); *In re I.C.G.*, No. E2006-00746-COA-R3-PT, 2006 WL 3077510 at *4 (Tenn. Ct. App. Oct. 31, 2006)).

The trial court determined that termination of parental rights was in the best interest of the children. This finding, likewise, is fully supported by the evidence and record.

IV. Conclusion

For the foregoing reasons we modify the judgment of the trial court by reversing as a ground for termination of Mother and Father's parental rights abandonment by failure to support and by reversing as a ground for termination of Father's parental rights failure to comply with the permanency plan; in all other respects the judgment of the trial court is affirmed.

This matter is remanded to the Juvenile Court for Maury County for such further proceedings as may be necessary. Costs of this appeal are assessed to Mother and Father, equally.

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RICHARD H. DINKINS, JUDGE